In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-274

RONALD LOUIE,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Ronald Louie petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

PRELIMINARY STATEMENT

This case presents an issue identical to that before this Court in *U.S. v. Rose Wong,* No. 74-635, certiorari granted June 1, 1976.

OPINION BELOW

The Memorandum of the Court of Appeals affirming petitioner's conviction (App. A, *infra*, p. i) will not be published (Rule 21(a), Rules of the United States Court of Appeals for the Ninth Circuit).

JURISDICTION

The opinion of the Court of Appeals was entered on June 23, 1976. Through inadvertent mailing errors, neither petitioner nor his counsel learned of the action of the Court of Appeals until the mandate of that Court had been received by the United States District Court for the Northern District of California, and petitioner had been ordered by the U. S. Marshal to surrender, by notification on July 27, 1976 to his attorney. Petitioner immediately filed with the Court of Appeals a motion for recall of its mandate (App. B, *infra*, p. xix). On July 30, 1976, the Court of Appeals entered an order (App. C, *infra*, p. xxvi) granting the motion to recall the mandate, and staying the mandate for thirty days from July 30, 1976, to enable petitioner to file a petition for writ of certiorari with this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a putative defendant called as a grand jury witness who, because of his limited knowledge and comprehension of the English language, does not understand the prosecutor's explanation of his right

to invoke his Fifth Amendment privilege to remain silent is entitled to the suppression of his grand jury testimony in a subsequent prosecution for perjury.

Or, stated in another way, whether a putative defendant called before a grand jury, who is compelled to either incriminate himself or perjure himself because he is unaware and not informed of his Fifth Amendment privilege, is thereby deprived of due process, and entitled to the suppression of his grand jury testimony in a subsequent prosecution for perjury.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

2. 18 U.S.C. 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On September 6, 1973, petitioner testified before a grand jury for the Northern District of California investigating illegal gambling operations and obstruc-

tion of state and local law enforcement. The following day Mrs. Rose Wong appeared before the same grand jury, which appearance led to her indictment for perjury, and to the case which is before this Court in No. 74-635. Petitioner was one of several putative defendants who were called before the grand jury after other witnesses had testified before the jury that the putative defendants had paid money to police officers to enable the continuance of gambling operations. Like Mrs. Wong, petitioner was told by the Assistant United States Attorney that he could refuse to answer any question which might incriminate him. The difficulty with such a warning, petitioner later testified at his trial for perjury, was that he did not understand it, because of his limited comprehension of English. All of petitioner's motions to suppress his grand jury testimony on that ground, made before, during and after the testimonial phase of his trial, were denied, the trial court ruling that in a perjury prosecution such lack of understanding was irrelevant. He was convicted on two counts, and committed to the custody of the Attorney General for two years, with his sentence suspended on condition that he spend six months in a jail type or treatment institution and the remainder of the two years on probation.

Petitioner appealed to the Court of Appeals on several grounds, including the one urged in this petition. On June 23, 1976, his judgment of conviction was affirmed.

REASONS FOR GRANTING THE WRIT

This Court already has before it in *U.S. v. Rose Wong, supra,* the identical issue presented by this petition, arising out of the same grand jury investigation.

The Court of Appeals relied on *U.S. v. Mandujano,* ..... U.S. ....., 44 USLW 4629, decided by this Court on May 19, 1976, in determining that "the failure to apprise a virtual or putative defendant of his constitutional right against self-incrimination" (Appendix A, *infra,* p. ix) does not require suppression of his perjured grand jury testimony. In doing so, it was apparently unaware that this Court granted certiorari in *Wong* on June 1, 1976. It apparently was equally unaware that the Government promptly moved this Court after certiorari was granted in *Wong* for its summary disposition, by immediate reversal and remand to the Ninth Circuit for reconsideration in the light of *Mandujano.* Its decision in this case came down a week before this Court, on June 30, 1976, denied the Government's motion for summary disposition in *Wong. Wong* is now being briefed by the Government, and will be argued in the coming term. Clearly, this Court's decision in *Wong,* and not *Mandujano,* will be dispositive of this case.

Petitioner sought an opportunity in his motion for recall of mandate to petition the Court of Appeals for rehearing, to suggest to that Court that it await this Court's decision in *Wong* before finally deciding petitioner's appeal. The order granting the motion stayed the mandate only to permit the filing of this petition with this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, August 16, 1976.

ALLAN BROTSKY,
Attorney for Petitioner.

(Appendices Follow)

APPENDICES

Appendix A

Do Not Publish

United States Court of Appeals
for the Ninth Circuit

No. 74-1935

United States of America,
Plaintiff-Appellee,
vs.
Ronald Louie,
Defendant-Appellant.

[June 23, 1976].

Appeal from the United States District Court
for the Northern District of California

MEMORANDUM

Before: BROWNING, DUNIWAY and INGRAHAM,*
Circuit Judges.

Appellant Ronald Louie was convicted for making false statements before a grand jury in violation of

*The Honorable Joe McDonald Ingraham, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

18 U.S.C. § 1623.[1] On appeal he claims that the government failed to apprise him of his constitutional

[1]18 U.S.C. § 1623 provides:

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

rights under *Miranda v. Arizona,*[2] and that the district court erred in its instructions concerning the entrapment defense.[3]

FACTS

In 1973 Police Officers Gurnie Cook and George Koniaris were assigned to investigate gambling activities in the Chinatown area of San Francisco. During their investigation Cook and Koniaris entered appellant's gambling parlor at 600 Jackson Street. Because of the parlor's elaborate security system, however, they were never able to actually observe gambling in appellant's establishment. Subsequently, the officers had a discussion with appellant which resulted in an arrangement whereby Louie would pay each officer $400 a month in exchange for the officers' promise not to harass his place of business or to arrest his customers.

Appellant and the officers offered different versions concerning the negotiations. According to appellant, the officers entered the gambling parlor and ejected the remaining customers. Koniaris then told appellant that he expected to be paid for not making arrests. After some haggling over the amount of pay-

[2]384 U.S. 436 (1965). Chief Justice Burger recently noted that *Miranda* warnings are required before custodial interrogation by police—a situation much different from questioning during the course of a grand jury investigation. *United States v. Mandujano,* ..... U.S. ..... at ..... (1976) [44 USLW 4629 at 4634].

[3]Appellant claims that the charge was defective in two respects: (1) requiring the jury to find specific inducement to commit perjury, and (2) failing to adequately admonish the jury on the government's burden of proof.

off, the officers agreed to accept $200 a week, with increases as the business prospered.

According to Officer Koniaris, Louie initiated the discussion concerning payoffs. Louie told the officers that he would pay any amount of money if he could continue his gambling activities without harassment or arrest. Louie then suggested the payment of $400 a month to each officer.

Appellant paid the officers regularly from April to September 1973. Payments totaled $4,700, all of which was turned over to the Federal Bureau of Investigation.

Appellant was subpoenaed to appear before a grand jury on September 6, 1973. During a conversation with Cook and Koniaris, appellant attempted to ascertain the purpose of the subpoena. Cook said that the investigation would probably concern gambling in Chinatown. Appellant assured the officers that he would not "say anything to implicate [them] or get [them] into trouble."

On September 6, 1973, appellant testified before a grand jury investigating illegal gambling activities[4] and obstruction of state and local law enforcement.[5] Before appellant testified, the United States Attorney explained the constitutional rights under the Fifth Amendment and the nature and consequence of per-

[4]18 U.S.C. § 1955.
[5]18 U.S.C. § 1511.

jury.[6] Thereupon, the government elicited the following testimony which formed the basis of the present two count indictment for perjury:

[6]The following grand jury testimony was read to the jury at appellant's trial:

MR. WARD: By the foreman:

"Do you solemnly swear that in the matter in which you are about to testify before this United States Grand Jury in and for the Northern District of California, that you will tell the truth, the whole truth, and nothing but the truth, so help you God?"

The witness answers: "I do."

"Please be seated.

"Your name, please?

"Ronald Louie."

Question: "Mr. Louie,"—this is the foreman speaking again.

"Mr. Louie, let me tell you who we are.

"We are the Federal Grand Jury for the Northern District of California.

"This is the secretary; I am the foreman; this is the deputy foreman; these are United States attorneys; this is the stenographer; and these are the jurors."

And then the examination commences by Mr. Ward. (Questions read by Mr. Ward; answers read by Mr. Bryztwa:)

Q. Mr. Louie, will you spell your last name for the stenographer?

A. L-o-u-i-e.

Q. Mr. Louie, you have been subpoenaed to appear before this grand jury because the grand jury is investigating certain violations of federal law in the Chinatown area involving the violations of gambling laws and other matters.

A. Un-huh.

Q. You have been subpoenaed here because the grand jury feels you may be helpful in providing information which will assist them in their investigation.

Prior to me asking you questions, it is customary for us to advise witnesses of certain rights to which they are entitled prior to answering any questions in the grand jury.

Let me advise you, if you have not already been advised, that you have the right to refuse to answer any question which I or a member of the grand jury may ask you if you feel that it may tend to incriminate you.

Do you understand what that means?

A. Yes.

Q. I would caution you further, however, that you may not use that right as a shield to protect someone else.

"MR. WARD—Q. Are you familiar with the address at 600 Jackson in Chinatown?

MR. LOUIE—A. Yes, sir.

"Q. Can you tell us, Mr. Louie, what is 600 Jackson Street?

A. That is Social Club. Where all the people get off work and read the paper and get together. Sometime we cook something to eat and play

---

You may invoke that right only when you feel that the answer to a question may tend to incriminate you, personally. Do you understand that?

A. Un-huh.

Q. You have to speak your answer so the stenographer can hear.

A. Yes, sir.

Q. Also, Mr. Louie, prior to answering any question, if you feel that you wish to consult with an attorney, you have the right to do that; and it is my understanding you have an attorney outside the grand jury room.

A. Yes, sir.

Q. What is his name?

A. Norman Sauer.

Q. You have consulted with him prior to appearing here today?

A. Yes.

Q. (By Mr. Ward:)

Mr. Louie, let me caution you, however, that should you answer questions before this grand jury, you are now under oath and, having sworn to tell the truth, you must do so; and should you knowingly give any false answer to any question, you would likely to suffer the penalties of perjury.

I just might advise you that there is a federal crime involving perjury before a grand jury which carries a penalty of, I believe, $10,000 fine and five years in prison.

So, you know, that it is not advisable to knowingly give false answers to whatever questions we might ask.

BY MR. WARD: The transcript indicates that the witness nodded.

* * * *

Q. (By Mr. Ward:)

As I said, Mr. Louie, this grand jury is investigating, among other things, certain gambling activities in Chinatown.

M.J. Is a M.J. place. M.J. is Mah Jong game. It is legal.

* * * * *

Q. Are there any other games played there besides M.J. and the Finger Card game?

A. No, that's about all we play.

Q. Is Pai-Gow ever played there?

A. No.

Q. What about Fan Tan?

A. No.

Q. To the best of your knowledge, has Fan Tan or Pai-Gow ever been played there since you have been there?

A. No.

* * * * *

Q. Do you know of any gambling that does go on in Chinatown, Mr. Louie?

A. No. I don't know. I don't go out that much and I don't spend that much time in Chinatown and I have to take my daughter to tennis in Golden Gate, and the four of them back East, I really don't have that much time down there.

Q. Are you saying that you don't have any knowledge of gambling in Chinatown?

A. Yes, sir.

* * *

Q. Have you ever discussed gambling with any police officer?

A. No sir.

* * * * *

MR. WARD—Q. During the year 1973, have you, yourself ever given money to any police officer?

MR. LOUIE—A. No sir.

* * * * *

Q. These officers, say Officer Koniaris, Officer Cook, and Officer Clooney, would you have any

knowledge about them receiving any money in Chinatown?

A. Gee, I don't know sir. I really don't know.

Q. Have you yourself given any of those officers money in Chinatown?

A. No sir.

Q. In the year 1973?

A. No sir.

Q. Have you ever given any of those three officers money at any time?

A. No sir.

Q. For any reason?

A. No sir.

Q. Have you ever given any other officers money at any time?

A. No.

Q. For any reason?

A. No.

Q. Do you know of anyone in Chinatown who may have given any police officer——

A. No sir.

Q. —money for any reason?

A. No sir."

At trial appellant admitted unequivocally that he made the above statements alleged to be perjurious, that they were not true, and that he knew that the statements were false. Appellant testified that he did have knowledge of gambling in Chinatown and that Fan Tan and Pai-Gow were played at his gambling parlor. He also admitted making payoffs to police officers during 1973. Appellant, however, asserted three defenses to the two count indictment: entrapment, coercion and insufficient explanation of constitutional rights under the Fifth Amendment.

FIFTH AMENDMENT

Appellant argues that because of his limited knowledge and comprehension of the English language, he did not understand the prosecutor's warnings. His lack of understanding, he contends, renders the warnings administered to him ineffective, thus requiring his grand jury testimony to be suppressed.

Appellant points out that he was born in China and lived there until he was about fifteen years old. When he came to the United States he attended American schools for about three years and then returned to China for about eight years. Louie speaks English as a second language; the language generally spoken in his home is Chinese. Assuming that Louie did not fully comprehend the prosecutor's warnings,[7] we consider whether the failure to apprise a virtual or putative defendant of his constitutional right against self-incrimination requires suppression of the perjured grand jury testimony.

Recently the Supreme Court held that although the Fifth Amendment guarantees an individual the right to refuse potentially incriminating questions put to him before a grand jury, the Constitution does not afford protection for perjured testimony. *United States v. Mandujano,* ..... U.S. ..... (May 19, 1976) [44 USLW 4629]. Indeed, an individual choosing to

[7]To establish that Louie understood all of the prosecutor's warnings, the government relied on the record. A reading of the grand jury transcripts indicate that Louie generally understood the questioning throughout the proceedings. The district court, however, did not make an express finding that appellant understood the prosecutor's warnings relating to the right to counsel and privilege against self-incrimination.

testify falsely before a grand jury takes "a course that the Fifth Amendment gave him no privilege to take." *United States v. Knox,* 396 U.S. 77, 82 (1969).

Chief Justice Burger stated:

> "In this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. The power of subpoena, broad as it is, and the power of contempt for refusing to answer, drastic as that is—and even the solemnity of the oath—cannot insure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it.
>
> "Similarly, our cases have consistently—indeed without exception—allowed sanctions for false statements or perjury; they have done so even in instances where the perjurer complained that the Government exceeded its constitutional powers in making the inquiry."

..... U.S. ..... at ..... [44 USLW 4629 at 4634]. He then distinguished two modes of questioning, police interrogation and grand jury investigation:

> "* * * [*Miranda*] warnings were aimed at the evils seen by the Court as endemic to police interrogation of a person in custody. *Miranda* addressed extra-judicial confessions or admissions procured in a hostile, unfamiliar environment which lacked procedural safeguards. The decision expressly rested on the privilege against compul-

> sory self-incrimination; the prescribed warnings sought to negate the 'compulsion' thought to be inherent in police station interrogation. But the *Miranda* Court simply did not perceive judicial inquiries and custodial interrogations as equivalents: '. . . the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.' *Miranda, supra,* at 461.
>
> "The Court thus recognized that many official investigations, such as grand jury questioning, take place in a setting wholly different from custodial police interrogation. . . . To extend these concepts to questioning before a grand jury inquiring into criminal activity under the guidance of a judge is an extravagant expansion never remotely contemplated by this Court in *Miranda;* the dynamics of constitutional interpretation do not compel constant extension of every doctrine announced by the Court.
>
> "The marked contrasts between a grand jury investigation and custodial interrogation have been commented on by the Court from time to time. MR. JUSTICE MARSHALL observed that the broad coercive powers of a grand jury are justified, because '. . . in contrast to the police—it is not likely that [the grand jury] will abuse these powers.'"

..... U.S. ..... at ..... [44 USLW 4629 at 4634]. The Chief Justice thus concluded that the Fifth Amendment does not require suppression of grand jury testimony on the ground that the virtual or putative

defendant was not fully warned under *Miranda v. Arizona.*

Without a showing of prosecutorial misconduct amounting to a denial of due process, the Fifth Amendment's privilege against compulsory self-incrimination provides no protection for the commission of perjury. *United States v. Mandujano,* ..... U.S. ..... at ..... [44 USLW 4629 at 4643]. In the instant case appellant was called only once before the grand jury with numerous other witnesses, all of whom were questioned concerning gambling activities and payoffs to police officers in Chinatown. The transcript of Louie's testimony before the grand jury reveals that the grand jury was pursuing a legitimate function rather than attempting to trap the witness into committing perjury. In light of the Supreme Court's opinion and judgment in Mandujano, appellant's Fifth Amendment claim is without merit.

ENTRAPMENT

Appellant claims that the district court's instruction on entrapment misled the jury into thinking that it could not acquit unless the particular criminal conduct was induced by government agents; that is, the instruction improperly charged that the jury must find specific inducement for perjury. Additionally, appellant claims that the instructions relating to entrapment failed to clearly provide that the jury should acquit if it entertains a reasonable doubt as to whether he was the victim of entrapment.

The district court issued the following instructions relating to entrapment:

> Turning now to the defendant's contention that in committing the crime of perjury charged in the indictment, he was the victim of an entrapment, I instruct you that although entrapment may, under certain circumstances, excuse what would otherwise be a crime, any entrapment claimed by a person as an excuse for a crime must be of a particular kind, must be a particular kind of entrapment, which I will attempt to explain to you.
>
> Entrapment, as that term is used in the law, means that where a person who has no previous intent or purpose to violate the law is induced or persuaded to do so by law enforcement officers or their agents or decoys into committing a crime, he is considered as having been entrapped; and the law as a matter of public policy, forbids conviction in such circumstances.
>
> The reason for this rule is that government law enforcement officers, although they have certain rights in respect to their attempts to enforce the law, should not be permitted to so substantially and extensively enmesh themselves as an apparent participant in criminal activity so as to violate the fundamental laws of decency and fairness.
>
> On the other hand, I wish to instruct you and make it clear to you that where a person already has a readiness and willingness to break the law, then the mere fact that government agents, government police arrange what appears to be a favorable opportunity for him to do so in order

to arrest him if he does, does not amount to entrapment, within the meaning of the law.

For example, where the government suspects that a person is engaged in unlawful activities, the government, acting for law enforcement purposes, has a right to arrange for law enforcement officers, pretending to be someone else, or making some other pretense, to offer that person or persons an opportunity to violate the law, and the duty to arrest him if he does, or the duty to develop in that way further information in connection with the investigation of the crime.

In such a situation, there would be no entrapment within the meaning of the law if the suspect, having already a willingness and readiness to break the law, does so.

To be considered in determining whether there was an entrapment is the defendant's state of mind with respect to whether he was already willing and ready to commit offenses of that kind; or, on the other hand, whether he was so previously without any purpose or intent to do so that his eventual commission of the offense was brought about by the government's inducement and persuasion.

When the issue of entrapment is raised in a case of this kind, the burden of proof remains always upon the government to prove beyond a reasonable doubt that the defendant was not entrapped within the meaning of the law.

So if the evidence in this case is such as to leave you with a *reasonable doubt* as to whether the defendant was entrapped within the meaning of the law, as I have tried to explain it to you, then the defendant would be entitled, from that

reasonable doubt on this subject to acquittal on the ground of entrapment.

On the other hand, if you are satisfied from the evidence *beyond a reasonable doubt* that, before anything at all occurred respecting the alleged offense for which the defendant is now on trial, that is the false testimony before the Grand Jury, *the defendant was willing and ready to commit such an offense when an occasion or opportunity might be presented to him,* and that the government officers or police did no more than arrange such an opportunity, then the jury should find that there was no entrapment within the meaning of the law.

Now I think that this should be sufficient to give you the legal guidelines that apply to a case of this kind. However, after the arguments of counsel have been heard, I may further explain these rules to you.

. . . . . .

. . . I want to make it clear to you at the outset that the entrapment issue in this case is not whether the defendant was entrapped into paying money to police officers for a continuance of gambling, but whether he was entrapped within the meaning of my instructions, into committing the offense charged in this case; that is, perjury, giving false testimony on that subject before the Grand Jury.

That he may have been entrapped into the former, that is, into paying money to police officers for protection of his gambling, that he may have been entrapped in that respect does not necessarily mean that he was entrapped into testifying falsely on that subject before the Grand Jury.

However, in determining the issue in this case, that is, whether the defendant was entrapped within the meaning of my instructions into testifying falsely before the Grand Jury, you may, and should, *take into consideration all of the evidence before you on this trial concerning the conduct of the police officers in question in their dealings with the defendant and all their conversations with him before and leading up to his appearance before the Grand Jury.*

This evidence, of course, will include testimony in the case concerning whether or not inducement or persuasions of the police officers, if any, entrapped him into paying them money for their pretended gambling protection, and also any evidence in the case concerning the knowledge of acquiescence of the police officers, if any, with respect to defendant's intention to commit perjury on that subject, and whether or not any such inducement or persuasions, by word or conduct amounted to a continuing inducement or persuasion to the defendant to commit the ultimate perjury before the Grand Jury.

One of the elements concerning an entrapment, as I previously instructed you—well, let me put it this way: In order to constitute an entrapment of a person into committing what would otherwise be a criminal offense, two elements are necessary. First, that the criminal act—in this case, giving false testimony before the Grand Jury—originated not in the mind of the defendant himself, but in persuasions or inducements of public officials, police officers in this case.

In the pending case, there is testimony which comes through which you can construe as being

in both directions, or in either direction, depending upon the witnesses that you believe in this case. Of course, if the criminal act, the giving of false testimony before a Grand Jury originated in the mind of the defendant himself rather than in inducements or persuasions of police officers, then there would be an entrapment. But even if these were persuasions and inducements of police officers leading to such false testimony before the Grand Jury, then it must further appear, in order to constitute entrapment within the meaning of the law, that the defendant was so previously without any purpose or intent to commit the perjury; that his eventual commission of perjury was, or must have been brought about by the police officers' inducements and persuasions.

Now in determining, or in trying to determine whether or not this defendant was already willing and able—or, put it this way: In order to determine whether or not the defendant Louie in this case was already willing and ready to make payoffs to police officers for protection of his gambling, you may, and should take into consideration all of the evidence in that case that sheds any light upon his disposition in that respect, including any evidence in this case, if there be such evidence, of his own admissions prior to this trial made to the police officers to the effect that he was, or had been making such payments for that purpose to other police officers.

(Emphasis added.) The district court instructed the jury to consider all of the evidence, thus directing their attention to the major factual conflict, the circumstances surrounding the payoff negotiations and

arrangements. Additionally, it is clear that the district court repeatedly admonished the jury concerning the government's burden of proof. Appellant's claims relating to the district court's entrapment instructions are without merit.

The judgment of the district court is AFFIRMED.

Appendix B

In the United States Court of Appeals
for the Ninth Circuit

No. 74-1935

United States of America,
Plaintiff-Appellee,
vs.
Ronald Louie,
Defendant-Appellant.

[Filed July 28, 1976]

EMERGENCY MOTION FOR RECALL OF MANDATE

Appellant Ronald Louie hereby moves the Court for an order recalling the mandate in the subject appeal. The United States of America, appellee, has no objection to such an order.

Said motion is made on the ground that attorneys for appellant did not receive notice that the Court had decided the appeal until July 27, 1976, although the appeal was decided on June 23, 1976, thereby depriving appellant of the right to counsel during the twenty one (21) day period before the mandate issued, and thereafter, and thus depriving appellant of

the right to file such petitions with this Court as the interest of appellant compelled.

Said motion will be based on the affidavit of Allan Brotsky which is attached hereto and made a part hereof, and upon all the files and records in this Court of this Appeal.

Dated: July 28, 1976.

Garry, Dreyfus, McTernan, Brotsky,
Herndon & Pesonen, Inc.,
/s/ Allan Brotsky,
Allan Brotsky,
Attorneys for Defendant-Appellant.

AFFIDAVIT OF ALLAN BROTSKY

State of California
City and County of San Francisco—ss

Allan Brotsky, being first duly sworn, deposes and says:

I am one of the attorneys for appellant herein and make this affidavit in support of appellant's motion to recall the mandate in the instant appeal. This extraordinary remedy is necessitated by the fact that counsel for appellant received no notice that the appeal had been decided in this case until thirty five (35) days after the Court issued its opinion, and after the mandate of this Court had issued to the United States District Court.

On July 27, 1976, upon my return to the office after lunch, I was informed that a message had been received from the United States Marshal's office in San

Francisco concerning the surrender to that office of Ronald Louie, the appellant. I immediately phoned the Marshal's office to inform them that there must be some mistake since to our knowledge Mr. Louie's appeal was still pending and undecided in this Court. The representative of the Marshal's office informed me that that office had just received a letter from the United States District Court informing it that the mandate of this Court had been received, affirming appellant's judgment of conviction.

I thereupon immediately phoned Mr. Emil Melfi, Clerk of this Court, to explain what I had just learned from the Marshal's office, and to determine why this office had never been notified of the Court's decision or received a copy of its Memorandum. After the conversation with Mr. Melfi, the reason for the mix-up was clear. In July, 1974, during the pendency of this appeal, our office had moved from 341 Market Street to 1256 Market Street in San Francisco. We had notified the Clerk's office of our change of address and had placed our new address on Appellant's Reply Brief. The Clerk's office had inadvertently mailed the opinion to our old address, 341 Market Street. The building at 341 Market Street was razed some time in 1975. Despite an outstanding change of address order which we had filed with the United States Post Office, the opinion addressed to 341 Market Street was not forwarded to our offices at 1256 Market Street. Nor was the mail addressed to 341 Market Street returned to the Clerk of this Court by the Post Office as undelivered, thus affording the Clerk's office notice that we had not received the opinion.

Mr. Melfi made a copy of the Memorandum of the Court available to me at 8:30 A.M. on July 28, 1976, the date of this affidavit. A reading of the opinion indicates at least one wholly meritorious ground for filing a petition for rehearing with this Court, and a petition for certiorari with the United States Supreme Court if this Court should deny the petition for rehearing. The case of *U.S. v. Rose Wong,* No. 74-1636 of this Court, was decided by this Court on November 7, 1974. It presented an issue identical to one of the issues in this case, namely, whether a defendant's lack of understanding of the prosecutor's explanation of the Fifth Amendment privilege because of limited knowledge and comprehension of the English language requires the suppression of grand jury testimony in a perjury prosecution. In *Wong,* the testimony was suppressed by order of the United States District Court, and this Court affirmed. The Government petitioned for certiorari, and on June 1, 1976, certiorari was granted by the United States Supreme Court. *U.S. v. Rose Wong,* No. 74-635. The Government promptly moved the United States Supreme Court to summarily reverse the judgment of this Court in *Wong,* and to remand *Wong* to this Court for reconsideration in the light of *U.S. v. Mandujano,* No. 74-754, decided May 19, 1976. On June 30, 1976, the Supreme Court denied the Government's motion, and *Wong* is now being briefed and will be argued during the October Term, 1976. It is thus clear that the Supreme Court of the United States does not consider *Mandujano* dispositive of the stated issue in both this case and *Wong*. The United States Marshal

has permitted appellant until Tuesday, August 3, 1976 to surrender.

On July 27, 1976, affiant explained the situation to Robert D. Ward, the assistant United States attorney handling the matter for the Government, and he authorized me to state that the Government did not object to the recall of the mandate.

For all the foregoing reasons, it is respectfully submitted that this Court should immediately issue its order recalling its mandate, so that appellant may file a petition for rehearing in this Court. It is further requested that appellant be granted fourteen (14) days after the entry of such an order to file a petition for rehearing with this Court.

/s/ Allan Brotsky
Allan Brotsky

Subscribed and sworn to before me this 28th day of July, 1976 at San Francisco, California

(Seal)

Sally M. Sweet
Notary Public in and for said
City County and State
My Commission Expires Mar. 6,
1977

MEMORANDUM OF POINTS AND AUTHORITIES

"This court has the power to recall and amend its mandate to protect the integrity of its own processes. *Briggs v Pennsylvania R. Co.,* 334 U.S. 304, 306, 68 S Ct. 1039, 92 L Ed. 1403 (1948); *Samson Tire & Rubber Corporation v Rogan,* 140 F 2d 457 (9th Cir 1943); *Huntley v Southern Oregon Sales,* 104 F 2d 153, 155 (9th Cir 1939); accord, *Petersen v Klos,* 433 F 2d 911, 912 (5th Cir 1970)." *Perkins v Standard Oil Company of California,* 487 F 2d 672 (9th Cir 1973).

Dated: July 28, 1976

Garry, Dreyfus, McTernan, Brotsky,
Herndon & Pesonen, Inc.
/s/ Allan Brotsky
Allan Brotsky
Attorneys for Defendant-Appellant

In the United States Court of Appeals
for the Ninth Circuit

No. 74-1935

United States of America,
Plaintiff-Appellee,
vs.
Ronald Louie,
Defendant-Appellant.

PROPOSED FORM OF ORDER

Good cause appearing therefor, It Is Ordered that the mandate of this Court in the within cause heretofore issued to the United States District Court be, and it is hereby, RECALLED.

It Is Further Ordered that appellant is granted fourteen (14) days from the date of this Order within which to file a petition for rehearing with this Court.

Dated: ....., 1976

.....
Circuit Judge

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 74-1935

United States of America,
Plaintiff-Appellee,
vs.
Ronald Louie,
Defendant-Appellant.

[Filed July 30, 1976]

ORDER

Before BROWNING and SNEED, Circuit Judges

Upon due consideration and for good cause shown, the motion to recall the mandate in the above captioned case is granted. The mandate will be stayed thirty (30) days from the date this order is entered to enable appellant to file a petition for writ of certiorari with the United States Supreme Court.

/s/ James M. Browning
/s/ Joseph T. Sneed
U.S. Circuit Judges

No. 76-274

In the Supreme Court of the United States

OCTOBER TERM, 1976

RONALD LOUIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

SIDNEY M. GLAZER,
MICHAEL E. MOORE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-274

RONALD LOUIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1976. The petition for a writ of certiorari was not filed until August 24, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]On July 30, 1976, the court of appeals recalled its mandate and ordered that it be stayed for 30 days, but this does not affect the time for filing a petition for a writ of certiorari, which begins to run from the date of judgment. See Rule 22(2) of the Rules of this Court.

QUESTION PRESENTED

Whether petitioner is entitled to have his perjurious grand jury testimony suppressed because of his alleged failure to understand the prosecutor's warning concerning his privilege against self-incrimination.

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on two counts of making false declarations before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent prison terms of two years on each count, with all but the first six months suspended in favor of probation. On June 23, 1976, the court of appeals affirmed (Pet. App. A).

The evidence showed that in 1973 San Francisco police officers Gurnie Cook and George Koniaris were investigating gambling in the Chinatown area of San Francisco (Tr. 154-155, 320, 329). On several occasions, Cook and Koniaris entered petitioner's gambling parlor, where customers played Pai-Gow, Fan-Tan and Mah-Jong (Tr. 274-275, 230, 650). On March 26, 1973, Cook and Koniaris saw petitioner at his parlor; petitioner said that he had been looking for them and wanted to talk to them (Tr. 279-280, 331). He offered to pay money to the officers to let him operate his gambling business (Tr. 280, 217-218, 519).[2]

Between that date and September 1973, Cook and Koniaris received about thirteeen payments from petitioner, totalling $4,700, all of which was turned over to the F.B.I. (Tr. 215, 217, 237, 257, 334).

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[2]At another meeting petitioner asked Cook and Koniaris to enter other, competing gambling parlors, knock down their doors, run their customers out, kick over the tables, and search the "look-sees" in the alley (Tr. 224-225, 228, 337).

On September 6, 1973, petitioner testified before a special grand jury conducting an investigation to discover violations of 18 U.S.C. 1955 (operation of illegal gambling businesses) and 18 U.S.C. 1511 (obstruction of state and local law enforcement). Before testifying, appellant was given an oath, and the prosecutor explained his Fifth Amendment rights and the nature and consequences of perjury; the prosecutor also told petitioner that if he wished at any time to consult with his attorney, who was outside the grand jury room, the proceedings would be suspended so that he could do so.[3] Petitioner then denied that Pai-Gow and Fan-Tan were played at his parlor; he also stated that he had no knowlege of gambling in Chinatown and that he had never discussed gambling with any police officer; he further denied having given any money to police officers in 1973 (see Pet. App. vi-viii).

Petitioner admitted at trial that he had testified falsely before the grand jury as to these matters; he also admitted that at the time he testified he understood the import of his substantive testimony (Tr. 681, 719). He contended, however, that because of his difficulty with the English language he did not understand the prosecutor's explanation of his Fifth Amendment rights (*e.g.*, Tr. 66-67) and that he was therefore entitled to suppression of his grand jury testimony.

At trial, the district court instructed the jury that the question whether petitioner understood the prosecutor's warning was irrelevant to the case since, even if petitioner did not understand the prosecutor's explanation of

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[3]The warnings colloquy between petitioner and the prosecutor is set forth in the opinion of the court of appeals (Pet. App. v-vi, n. 6).

his Fifth Amendment rights, that "would not * * * constitute a legal defense or excuse for what would otherwise be perjury" (Tr. 808). On appeal, the court of appeals assumed without deciding that petitioner "did not fully comprehend the prosecutor's warnings" (Pet. App. ix) and, relying upon this Court's decision in *United States* v. *Mandujano,* No. 74-754, decided May 19, 1976, held that petitioner was nevertheless not entitled to have his perjured grand jury testimony suppressed.

DISCUSSION

All three opinions in *United States* v. *Mandujano,* No. 74-754, decided May 19, 1976, agree that, whether or not the prosecutor is constitutionally required to give some form of warnings to "putative defendant" grand jury witnesses, such a witness may not commit perjury and thereafter claim that the Constitution affords protection from prosecution for that crime. Petitioner contends (Pet. 5), however, that *Mandujano* does not apply to his case because, unlike Mandujano, he did not understand the warnings administered by the prosecutor before he testified falsely to the grand jury. Petitioner urges instead that his case will be controlled by *United States* v. *Wong,* No. 74-635, certiorari granted June 1, 1976. As we have noted in our brief in *Wong* (Br. 12-14),[4] the only arguably relevant factual distinction between that case and *Mandujano* is that the district court found that respondent Wong did not understand the warnings administered by the prosecutor before her grand jury appearance.

[4]Counsel for petitioner here is also counsel for respondent in *United States* v. *Wong* and thus has already been served with the government's brief in the latter case.

In contrast to the factual setting of *Wong,* there has been no finding in this case that petitioner did not understand the prosecutor's warning of his Fifth Amendment rights. We believe it is appropriate, however, for the Court to hold this case pending its disposition of *Wong.* The district court here did not find it necessary to resolve the question whether petitioner understood the prosecutor's warnings, since it believed that resolution of that factual issue was irrelevant to the question whether the perjurious grand jury testimony should be suppressed. For the reasons stated in our brief in *Wong,* we agree with this position. If the Court holds to the contrary in *Wong,* however, it would be appropriate to grant this petition, vacate the judgment, and remand the case for a determination of the factual question whether petitioner understood the prosecutor's explanation (or was otherwise aware) of his privilege against self-incrimination.[5]

[5]On the present record, petitioner's contention that he did not understand his privilege is implausible. Neither the trial transcript nor that portion of the grand jury transcript containing the warnings colloquy between petitioner and the prosecutor reveals any hint of the language problem that petitioner claims prevented him from understanding the prosecutor's warning concerning his Fifth Amendment privilege. Petitioner makes no claim that he did not understand the prosecutor's explanation of the purpose of the grand jury investigation, of his "right" to consult with counsel, or of the nature and consequences of perjury; nor does he assert that he misunderstood any of the substantive questions asked by the prosecutor during the proceedings. Indeed, petitioner conceded at trial that he had fully understood the import of his substantive testimony to the grand jury and had realized that his answers were false.

It is likewise undisputed that petitioner retained an attorney prior to his grand jury appearance and that, on the day of the grand jury hearing, his attorney was stationed immediately outside the grand jury room for the duration of the testimony. Once

It is therefore respectfully submitted that the Court should hold this petition for disposition in light of its decision in *Wong*.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

SIDNEY M. GLAZER,
MICHAEL E. MOORE,
Attorneys.

NOVEMBER 1976.

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inside the grand jury room, petitioner assured the prosecutor that he had consulted with his attorney concerning his grand jury appearance; the prosecutor advised him, moreover, that he could consult with his attorney before answering any question and that the proceedings would be suspended to give him an opportunity to do so (Grand Jury Tr. 4).

Finally, Officers Cook and Koniaris testified that petitioner had assured them two days before his scheduled grand jury appearance that he would not implicate them in his testimony (Tr. 313, 411-412), and, shortly after testifying, petitioner told the officers that he did not need any attorney since he was smarter than the people at the grand jury investigation (Tr. 427). The record also discloses that, prior to the grand jury hearing, petitioner entered a guilty plea to a gambling law violation and was represented by counsel on that occasion (Tr. 720). Accordingly, at the time of the grand jury hearing, petitioner was not unfamiliar with the criminal process and his constitutional rights.